IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

ORDER

v.

11-cr-34-wmc

JOHN J. MILLER,

Defendant.

In June 2011, a jury found the defendant, John J. Miller, guilty of threatening to kidnap and murder a federal district judge in violation of 18 U.S.C. § 115(a)(1)(B). This was his second such offense.[1] On September 7, 2011, this court sentenced Miller to serve 12 months and one day in prison, followed by a three-year term of supervised release. On April 16, 2013, this court revoked Miller's supervised release and sentenced him to 10 months' imprisonment for his repeated failure to comply with the terms and conditions of his release. Miller has filed a notice of appeal from that order. In addition, Miller filed a motion for new trial under Fed. R. Crim. P. 33, attacking the judgment of revocation and his underlying conviction. This motion will be denied.

Miller's motion for new trial, which is dated April 30, 2013, is the third one he has filed in the last five months. *See* Dkts. # 78, # 95, # 103. The motion does not include or describe any "newly discovered evidence" of innocence. Thus, to the extent that

[1] In 2008, Miller was convicted of threatening to murder a federal bankruptcy judge and using an instrument of interstate commerce to threaten to blow up a federal courthouse. *See United States v. Miller*, 08-cr-84 (E.D. Wis.).

Miller challenges the validity of his 2011 conviction, his motion is untimely. *See* FED. R. CRIM. P. 33(b)(2) (requiring that a motion for new trial must be filed within 14 days of the verdict or finding of guilty unless that motion is accompanied by "newly discovered evidence").

To the extent that Miller challenges the revocation of his supervised release on April 16, 2013, he argues that a new trial is required because he was denied effective assistance of counsel. A claim for ineffective assistance of counsel may be raised in a motion for new trial pursuant to Fed. R. Crim. P. 33. *See, e.g., United States v. Wooley*, 123 F.3d 627, 634 (7th Cir. 1997) (observing that "[t]he preferred method for raising a claim of ineffective assistance of counsel is either by bringing a motion for new trial or a request for collateral relief under 28 U.S.C. § 2255"). To demonstrate a violation of the right to effective assistance of counsel guaranteed by the Sixth Amendment, a defendant must demonstrate: (1) deficient performance by counsel that falls "below an objective standard of reasonableness"; and (2) actual prejudice as a result of the counsel's poor performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Miller can make neither showing here.

Miller alleges that his defense counsel (Reed Cornia) was deficient because he "just sat there" and failed to object during the revocation hearing when the court "called [Miller] names." Miller is not specific and the court is unaware of any basis for his contention. In that regard, the transcribed record confirms this court's own recollection that there was no antipathy expressed towards Miller during the hearing and there was

most assuredly no name-calling. On the contrary, Miller's apparent unwillingness or inability to remain on appropriate, prescribed medication or to otherwise conform to the terms and conditions of his release is a source of profound sadness and empathy, not antipathy and certainly not derision, for the court as it is for the defendant's family. Absent a showing that counsel had a valid reason to object, Miller's allegation cannot form the basis for an ineffective-assistance claim.

Miller contends further that his defense attorney was deficient because he refused to dispute the validity of his 2011 conviction for threatening to kidnap and murder a federal district judge. This argument is also a non-starter. Counsel cannot be faulted for failing to raise the argument proposed by Miller because his underlying conviction was neither at issue, nor was there a valid basis to challenge it for reasons addressed above. Counsel is not deficient for failing to raise a frivolous argument or objection. *See, e.g., Fuller v. United States*, 398 F.3d 644, 652 (7th Cir. 2005) (explaining that a defense attorney "has 'no duty to make a *frivolous* argument,' . . . and indeed is barred by the rules of professional ethics from doing so") (quoting *United States v. Rezin*, 322 F.3d 443, 446 (7th Cir. 2003) (emphasis in original)).

Having failed to demonstrate a legal basis to revisit his 2011 conviction or his 2013 revocation, the defendant's motion for new trial must be denied.

ORDER

IT IS ORDERED that the motion for new trial by defendant John J. Miller (dkt. # 103) is DENIED.

Entered this 22nd day of May, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge